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No. 03-1423

IN THE
Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,
Petitioners,

v.

IRIS MENA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
ARGUMENT	2
I. WHEN A SEIZURE IS BASED ON LESS THAN PROBABLE CAUSE, THE FOURTH AMENDMENT PROHIBITS INTERROGATION CONCERNING SUBJECTS UNRELATED TO THE SEIZURE'S JUSTIFICATION	2
A. As a General Rule, the Fourth Amendment Allows Seizure Only upon a Showing of Probable Cause	2
B. *Summers* Provides a Limited Exception to the Probable-Cause Requirement . .	3
C. The Justification for a Probable-Cause-Less Seizure Supplies the Measure of Its Permissible Scope	5
D. Questioning During a *Summers* Detention Must Be Limited to Matters Related to the Execution of the Search Warrant	8
E. Petitioners' Argument — That Any Questioning of a *Summers* Detainee Is Permitted so Long as It Does Not Prolong the Detention — Is Mistaken . . .	9
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
CASES	
Davis v. Mississippi, 394 U.S. 721 (1969) . .	12
Dunaway v. New York, 442 U.S. 200 (1979) .	2, 12
Florida v. Bostick, 501 U.S. 429 (1991)	10, 11
Florida v. Royer, 460 U.S. 491 (1983)	*passim*
Ganwich v. Knapp, 319 F.3d 1115 (9th Cir. 2003)	8, 12, 13
Hiibel v. Sixth Judicial District Court of Nevada, 124 S. Ct. 2451 (2004)	3, 6
INS v. Delgado, 466 U.S. 210 (1984)	10, 12
Illinois v. McArthur, 531 U.S. 326 (2001) . .	*passim*
Michigan v. Summers, 452 U.S. 692 (1981) .	*passim*
Terry v. Ohio, 392 U.S. 1 (1968)	*passim*
Texas v. Brown, 460 U.S. 730 (1983)	2
United States v. Arvizu, 534 U.S. 266 (2002)	1
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)	*passim*
United States v. Hensley, 469 U.S. 221 (1985)	10
United States v. Holt, 264 F.3d 1215 (10th Cir. 2001)	7
United States v. Jacobsen, 466 U.S. 109 (1984)	11

United States v. Knights, 534 U.S. 112 (2001)	1
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)	12
United States v. Mendenhall, 446 U.S. 544 (1980)	11
United States v. Murillo, 255 F.3d 1169 (9th Cir. 2001)	7
United States v. Pruitt, 174 F.3d 1215 (11th Cir. 1999)	7
United States v. Ramos, 42 F.3d 1160 (8th Cir. 1994)	7
Whren v. United States, 517 U.S. 806 (1996)	3
Ybarra v. Illinois, 444 U.S. 85 (1979)	5
CONSTITUTION	
U.S. Const. amend. IV	2

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers ("NACDL") respectfully submits this brief *amicus curiae* in support of respondent.[1]

INTEREST OF *AMICUS CURIAE*

NACDL is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice, including by ensuring that the conduct of police officers is consistent with constitutionally-required procedures. Consistent with this aim, NACDL has filed *amicus curiae* briefs in this Court in many cases involving the Fourth Amendment, including, recently, in *United States v. Arvizu*, 534 U.S. 266 (2002), and *United States v. Knights*, 534 U.S. 112 (2001).

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[1] This brief is filed with the written consent of both parties. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

Petitioners, supported by the United States as *amicus curiae*, argue that, when law-enforcement officers detain a person incident to the execution of a search warrant (as permitted by *Michigan v. Summers*, 452 U.S. 692, 705 (1981)), they may freely interrogate that person on any subject whatsoever, with the only limitation being that the interrogation must not stretch the duration of the detention. Adoption of that argument would constitute a dramatic and unwarranted expansion of law enforcement's investigative powers. Under this Court's established precedent, any seizure based upon less than probable cause must be limited to the justification for the seizure. Thus, a person who is detained without probable cause may be interrogated only concerning matters related to the circumstances that justified the seizure.

I. WHEN A SEIZURE IS BASED ON LESS THAN PROBABLE CAUSE, THE FOURTH AMENDMENT PROHIBITS INTERROGATION CONCERNING SUBJECTS UNRELATED TO THE SEIZURE'S JUSTIFICATION.

A. As a General Rule, the Fourth Amendment Allows Seizure Only upon a Showing of Probable Cause.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Its 'central requirement' is one of reasonableness." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (quoting *Texas v. Brown*, 460 U.S. 730, 730) (1983). Whether a search or seizure is reasonable for purposes of the Fourth Amendment has long turned on the "familiar threshold standard of probable cause." *Dunaway v. New York*, 442 U.S. 200, 213 (1979). As

the Court has noted, the probable-cause requirement "reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule." *Id.* at 213. It is therefore of "central importance . . . to the protection of a citizen's privacy afforded by the Fourth Amendment." *Id.*

To be sure, this Court has in recent years held that whether a seizure is permitted by the Fourth Amendment may be determined more loosely "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Hiibel v. Sixth Judicial District Court of Nevada*, 124 S. Ct. 2451, 2459 (2004). *See also McArthur*, 531 U.S. at 331 (when warrantless restraint "involves a plausible claim of specially pressing or urgent law enforcement need," "rather than employing a *per se* rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns"). But, "[w]ith rare exceptions . . . , the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Whren v. United States*, 517 U.S. 806, 817 (1996). Conversely, the "general rule" is "that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." *Summers*, 452 U.S. at 700. Thus, probable cause remains the Fourth Amendment's gold standard.

B. *Summers* Provides a Limited Exception to the Probable-Cause Requirement.

Despite the general rule that a seizure must be supported by probable cause, a series of decisions beginning with *Terry v. Ohio*, 392 U.S. 1 (1968), has recognized narrow circumstances in which the Fourth Amendment

permits searches and seizures upon less than probable cause. *See Florida v. Royer*, 460 U.S. 491, 498 (1983) (plurality) ("Prior to *Terry v. Ohio*, . . . any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause.") (citation omitted). "These cases recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity." *Summers*, 452 U.S. at 699.

Thus, in *Terry* itself, the Court recognized a "narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Terry*, 392 U.S. at 27. As the Court explained, "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id.* at 24. Although the Court's analysis in *Terry* did not distinguish between seizure and search, the Court later "made explicit what was implicit in *Terry*," namely, "that the Fourth Amendment does not prohibit forcible stops when the officer has a reasonable suspicion that a crime has been or is being committed." *Summers*, 452 U.S. at 698 n.7.

Similarly, in *United States v. Brignoni-Ponce*, the Court held that the "modest" intrusion occasioned by a

"stop by a roving [border] patrol [that] usually consumes no more than a minute," could be "justified on facts that do not amount to the probable cause required for an arrest." 422 U.S. 873, 880 (1975). Although the Court rejected the Government's claim for authority to make such stops at random, it permitted Border Patrol agents to stop vehicles "if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *Id.* at 884. In allowing such stops on less than probable cause, the Court "t[ook] into account the special function of the Border Patrol [and] the importance of the governmental interests in policing the border area." *Id.* at 883 n.8.

Drawing on these cases, the Court in *Summers* held that officers executing a search warrant of a dwelling could detain an occupant during the search, even if the officers (at the time of the initial detention) lacked probable cause or even reasonable suspicion of foul play. The Court stressed the "legitimate law enforcement interest[s]" in "facilitat[ing]" the "orderly completion of the search" and in minimizing "[t]he risk of harm to both the police and the occupants." *Summers*, 452 U.S. at 702-03. The Court reasoned that the detention of a resident incident to a search of the premises "add[ed] only minimally" to the intrusion authorized by the search warrant. *Id.* Such a detention, the Court noted, stands "[i]n sharp contrast to . . . custodial interrogation." *Id.* at 702.

C. The Justification for a Probable-Cause-Less Seizure Supplies the Measure of Its Permissible Scope.

Because *Terry* and its progeny recognized "exception[s] to the requirement of probable cause," the Court must be "careful to maintain" their "narrow scope." *Ybarra v.*

Illinois, 444 U.S. 85, 93 (1979). For that reason, the Court has faithfully applied the principle that an interference based on less than probable cause must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20; *see id.* at 19 ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality) ("The scope of the detention must be carefully tailored to its underlying justification."); *McArthur*, 531 U.S. at 331 (upholding restraint that was "tailored" to a "plausible claim of specially pressing or urgent law enforcement need").

This limitation constrains interrogation just as surely as any other intrusion upon protected privacy interests. Thus, the Court stated in *Royer* that "reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of *questioning limited to the purpose of the stop*." 460 U.S. at 498 (plurality) (emphasis added); *see id.* at 500 ("the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion"). Similarly, the Court has stated that, where probable cause is lacking, "the stop *and inquiry* must be 'reasonably related in scope to the justification for their initiation.'" *Summers*, 452 U.S. at 710 (quoting *Terry*, 392 U.S. at 29) (emphasis added); *see also Hiibel*, 124 S. Ct. at 2460 (a "request for identification" must be "reasonably related to the circumstances justifying the stop"); *Brignoni-Ponce*, 422 U.S. at 881-82 ("The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.").

A majority of the courts of appeals that have addressed the matter has therefore correctly held that questioning of motorists at traffic stops must be related to the violation that gave rise to the stop. *See, e.g., United States v. Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001) ("During a traffic stop, a police officer is allowed to ask questions that are reasonably related in scope to the justification for his initiation of contact."); *United States v. Holt*, 264 F.3d 1215, 1228 (10th Cir. 2001) (en banc) (rejecting Government's argument that "during a traffic stop based on probable cause, length is the only constraint on questioning"); *United States v. Pruitt*, 174 F.3d 1215, 1220 (11th Cir. 1999) ("further questioning unrelated to the initial stop is permissible [only] if the initial detention has become a consensual encounter" or if "the officer has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring"); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994) ("After stopping the truck, the trooper could ask any questions reasonably related to the stop.").

None of this is to say that, during a seizure on less than probable cause, law-enforcement officers must play dumb. Questioning related to the circumstances that justified the seizure is permitted. And, in the course of the seizure, additional "reasonable suspicion" or even "probable cause" may develop, which may justify further questioning. Barring that, however, questioning unrelated to the circumstances legitimizing the search constitutes an unwarranted intrusion. The law permits police to detain certain suspects without probable cause out of concern for officers' safety or other exigent circumstances — not to enable custodial interrogation. Thus, if officers would not be entitled to seize a person for the purpose of subjecting him to custodial questioning, they should not be allowed

to accomplish the same result as an undeserved by-product of the law's special concern.

D. Questioning During a *Summers* Detention Must Be Limited to Matters Related to the Execution of the Search Warrant.

The justification for a *Summers* detention is to facilitate the lawful execution of a search warrant and to protect officers engaged in doing so. Consistent with those goals, the police are entitled to detain occupants for the duration of the search, and to arrest them if the search provides probable cause to do so. But police may not take advantage of the detention to conduct a "general exploratory" investigation of criminal activity. *Terry*, 392 U.S. at 30.

Thus, interrogation of a *Summers* detainee, if any, must be related to the execution of the search warrant. *See Ganwich v. Knapp*, 319 F.3d 1115, 1122-23 (9th Cir. 2003) ("Because the interrogations of the plaintiffs were not carefully tailored to the detention's underlying justification, the detention was more intrusive than necessary. This rendered the detentions unlawful."). That means that interrogation is not permitted insofar as it "did not deter the plaintiffs' flight, did not reduce the risk of harm to officers, and did not assist the officers in the orderly completion of the search." *Id.*

Measured by that standard, the interrogation of the respondent in this case was impermissible. Officers detained respondent for several hours while they executed a search warrant issued in connection with a gang-related murder. The warrant authorized the police to search for Raymond Romero, for deadly weapons, and for "evidence of street gang membership or affiliation." JA 210-11. The officers' interrogation of respondent about her citizenship and immigration status had nothing to do with officer safety. Nor was it pertinent to the search: lack of

proper documentation hardly makes a suspect a gang member. Indeed, the very fact that petitioners brought along an INS agent indicates that the purpose of respondent's interrogation was immigration control, not investigation of possible gang activity.

Meanwhile, as the Court of Appeals pointed out, the interrogation lacked independent justification: apart from respondent's "apparent Hispanic/Latino ethnicity" — a factor that, standing alone, was insufficient to justify further inquiry[2] — "there was no reason evident in the record to be suspicious of her citizenship status." Pet. App. 10a. On the facts presented, therefore, the Court of Appeals correctly concluded that respondent stated a Fourth Amendment violation: petitioners "unduly invaded Mena's privacy by inquiring unnecessarily into her citizenship status." *Id.*

E. Petitioners' Argument — That Any Questioning of a *Summers* Detainee Is Permitted so Long as It Does Not Prolong the Detention — Is Mistaken.

Petitioners broadly contend that "the scope of a *Summers* detention is limited only by the time it takes to complete the search." Br. of Petitioners at 27. Similarly, the Government asserts that, "where . . . questioning of an occupant detained incident to a search warrant does not prolong the duration of the occupant's detention, the detention should be sustained." Br. of United States at 27. In support of their "duration is the only limitation" theory, Petitioners and the Government rely upon opinions in which this Court has stated that "mere police questioning

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[2] *See Brignoni-Ponce*, 422 U.S. at 885-86 ("single factor" of "apparent Mexican ancestry" does not "furnis[h] reasonable grounds to believe that the three occupants were aliens").

does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *see also INS v. Delgado*, 466 U.S. 210, 216 (1984). In the words of the Government, "because questioning does not constitute a discrete Fourth Amendment event, it follows that an officer need not have an independent justification, in the form of reasonable suspicion, before questioning an individual who has been lawfully detained." Br. of United States at 24; *see also* Pet. Br. at 18 ("questions do not become independent 'seizures' simply because they are asked of an individual who is already lawfully detained").

This argument is directly contrary to the Court's case law, which recognizes that probable-cause-less seizures must be limited not only in "duration" but also in "scope."[3] Moreover, the argument confuses two very different Fourth Amendment inquiries. The opinions upon which the Petitioners and the Government rely addressed the question whether a "seizure" has taken place — not whether, once a seizure has occurred, that seizure was "reasonable." The two inquiries turn on different facts: the former depends solely on curtailment of a citizen's freedom of movement, while the latter takes account of other privacy interests as well.

The Fourth Amendment does not govern every conceivable intrusion upon a citizen's privacy: by its terms, its reach is limited to "searches and seizures." U.S. Const. amend. IV; *see Delgado*, 466 U.S. at 215. In determining whether a "seizure" has occurred, the Court has

[3] *See, e.g., Royer*, 460 U.S. at 500 (plurality) (seizures based on less than probable cause must be "sufficiently limited in scope and duration"); *McArthur*, 531 U.S. at 331 ("[t]he restraint at issue was tailored to that need, being limited in time and scope"); *United States v. Hensley*, 469 U.S. 221, 235 (1985) (permissibility of *Terry* stop turns on "length and intrusiveness").

asked whether "a reasonable person would have believed that he was not free to leave."[4] Thus, questioning without more does not make an encounter a "seizure," at least so long as the citizen is free to walk away.[5]

Once a seizure has occurred, however, the inquiry becomes whether the seizure is "reasonable," *Brignoni-Ponce*, 422 U.S. at 878, which turns on "the nature and quality of the intrusion on individual rights," *Terry*, 392 U.S. at 24; *see id.* at 26 (law-enforcement interests must be balanced against "the sanctity of the individual"); *Brignoni-Ponce*, 422 U.S. at 878 ("the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers"). And, as explained above, where the seizure is not supported by probable cause, that intrusion may not be "more intrusive than necessary" to satisfy the law-enforcement interests

[4] *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *see also United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984) (seizure occurs when there is "meaningful interference . . . with an individual's freedom of movement"); *Terry*, 392 U.S. at 16 ("[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."); *id.* at 19 n.16 ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

[5] *See, e.g., Royer*, 460 U.S. at 497 (plurality) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if he is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."); *Bostick*, 501 U.S. at 437 ("[N]o seizure occurs when police ask questions of an individual . . . so long as the officers do not convey a message that compliance with their requests is required.").

justifying the detention in the first place. *Royer*, 460 U.S. at 504 (plurality).

For purposes of that inquiry, intrusiveness is not a function only of freedom of movement. "The Fourth Amendment . . . is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *Delgado*, 466 U.S. at 215 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)). Unquestionably, interrogation constitutes an intrusion implicating Fourth Amendment interests: it is "mark[ed]" by "probing into an individual's private life and thoughts." *Davis v. Mississippi*, 394 U.S. 721, 727 (1969).

Petitioners' argument not only improperly blurs the inquiry into whether a seizure has occurred with whether that seizure is reasonable but also wrongly equates questioning of someone who is free to leave with custodial interrogation. As this Court has held, "detention for custodial interrogation — regardless of its label — intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." *Dunaway*, 442 U.S. at 216. The reason is plain:

> [C]oerced interrogation is a serious intrusion upon the sanctity of the person. It may inflict great indignity and arouse strong resentment. It may make the subject feel the target of the government's vast machinery, in grave legal peril, alone and without counsel. It may make the subject feel that dread consequences hang on his or her words. It may make the subject feel that silence is not an option.

Ganwich, 319 F.3d at 1121.

Indeed, in *Summers* itself, the Court distinguished (what now is called) *Summers* detention from the more intrusive "custodial interrogation" it had examined in *Dunaway*. *See Summers*, 452 U.S. at 702 n.15 (seizure that is "designed to provide an opportunity for interrogation" tends to "have coercive aspects likely to induce self-incrimination"). That is why the *Summers* Court made doubly clear that it was not approving a detention "likely to be exploited by the officer or unduly prolonged in order to gain more information." *Id.* at 701.

In sum, petitioners' theory both conflates disparate issues and undervalues the especially intrusive nature of questioning while in custody. Detention unsupported by full-fledged probable cause is a special accommodation allowed in recognition of particularly weighty law-enforcement interests. When officers avail themselves of this accommodation they are "treading on thin constitutional ice." *Ganwich*, 319 F.3d at 1124. They may not use it as an excuse for intruding upon Fourth Amendment protected privacy interests to an extent that is greater than necessary to satisfy the interests authorizing the intrusion in the first place.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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